Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

No. 99-1655

In The

Supreme Court of the United States

JIANBIN "JIM" WEI,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT RICHARD V. FINK, TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. O'NEAL
of
SHUGHART THOMSON & KILROY, P.C.
901 St. Louis, Suite 1200
Springfield, MO 65806
(417) 869-3353
(417) 869-9943 (facsimile)

Counsel of Record for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

COUNTER-STATEMENT OF QUESTION PRESENTED

Respondent respectfully suggests that the issue framed by petitioner is more accurately stated as follows:

I. BECAUSE PETITIONER WAS PROVIDED NOTICE AND OPPORTUNITY TO BE HEARD BEFORE THE IMPOSITION OF SANCTIONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER WAS NOT DENIED HIS RIGHT OF DUE PROCESS WHEN THE COURTS BELOW ASSESSED SANCTIONS AGAINST HIM PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RULE 9011 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE.

PARTIES TO THE PROCEEDING

The named respondents in this case are Richard V. Fink, Trustee, in his capacity as trustee of the bankruptcy estate of Bobby N. Graven and Millie Ann Graven, deceased; and Thomas J. O'Neal, who is one of the attorneys who has represented the trustee in matters relating to the bankruptcy of Bobby N. Graven and Millie Ann Graven, deceased.

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STATEMENT OF CASE

Debtors, Bobby N. Graven and Millie A. Graven filed a Voluntary Petition under Chapter 12 of the Bankruptcy Code on November 12, 1987. The Debtors thereafter filed a Plan of Reorganization and a confirmation hearing on such plan was set for March 2, 1988. *In re Graven*, 84 B.R. 630 (Bankr. W.D. Mo. 1988) (*"Graven I"*). Several creditors objected to the proposed plan and the Bankruptcy Court, Judge Frank W. Koger presiding, issued an order on March 23, 1988, directing the Trustee, Richard V. Fink, to conduct an investigation into the affairs of the Debtors. *Graven I*, 84 B.R. 630. The Trustee filed a preliminary report and supplemental preliminary report, and a hearing was set for January 24, 1989, on such reports. The Debtors, at such hearing, filed an application for voluntary dismissal, pursuant to 11 U.S.C. § 1208(b). Thereafter, the Trustee filed the Trustee's Motion to Convert Case requesting the Court to convert the case to a case under Chapter 7 of Title 11.

A hearing on the Application for Voluntary Dismissal and the Trustee's Motion to Convert Case was held on April 10, 1989, and resulted in a memorandum opinion dated May 22, 1989, in which the Bankruptcy Court granted the Motion to Convert the case to Chapter 7 and held that the Debtors' Motion to Dismiss was therefore moot. *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989) (*"Graven II"*). The District Court affirmed such Order on March 29, 1990. The District Court's Order was affirmed by this Court in the case of *In re Graven*, 936 F.2d 378 (8th Cir. 1991) (*"Graven III"*).

During the course of the Chapter 7 proceedings, the Trustee, in Adversary No. 89-6057, filed a Second Amended Complaint against Bobby Noah Graven, Millie Anne Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under the Bobby N. Graven Trust, Will Fletcher, Graven Realty, Inc., and Great Midwestern Investments, Inc., on September 1, 1989.[1] The Trustee filed a Motion for Summary Judgment on January 17, 1992. The Bankruptcy Court filed a Memorandum Opinion dated March 20, 1992, denying the Trustee's Motion for Summary Judgment. *In re Graven*, 138 B.R. 587 (Bankr. W.D. Mo. 1992) ("*Graven IV*"). A hearing on the Second Amended Complaint was held on July 17, 1992, resulting in a Memorandum Opinion dated October 30, 1992, and a Judgment dated November 2, 1992. A hearing on the issue of damages was held on December 3, 1992, resulting in a Memorandum Opinion, and Judgment, dated February 8, 1993.

Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under the Bobby N. Graven Trust appealed such decision to the United States District Court for the Western District of Missouri which affirmed the Bankruptcy Court's decision in a Judgment and Order dated May 9, 1994. The Court of Appeals for the Eighth Circuit affirmed the District Court in an Opinion issued September 5, 1995. *In re Graven*, 64 F.3d 453 (8th Cir. 1995) ("*Graven V*"). The Appellants in *Graven V* then filed a Petition for a Writ of Certiorari with the

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[1] Millie Anne Graven died on September 28, 1989. Her personal representative, Bobby F. Graven, was substituted as a party in the adversary proceeding before the Bankruptcy Court.

United States Supreme Court. Such Petition was denied on May 13, 1996. *Graven Auction Co. v. Fink*, 517 U.S. 1189, 134 L.Ed.2d 779, 116 S.Ct. 1676 (1996).

The adversary action involved in Civil Case Number 96-3388 was instituted by the Debtors' filing of a pleading styled "Independent Action for Relief From Bankruptcy Proceedings, Judgments, and Orders" on December 18, 1995. Debtors subsequently filed a "First Amended Complaint for Independent Action or [sic] Relief From Involuntary Chapter 7 Liquidation Proceedings, Judgments, and Orders." The Bankruptcy Court filed a Memorandum Opinion and Judgment dated June 5, 1996, dismissing the First Amended Complaint and imposing sanctions under Bankruptcy Rule 9011 on Debtors and their attorney. *In re Graven*, 196 B.R. 506 (Bankr. W.D. Mo. 1996) (*"Graven VI"*). Upon the denial of the Debtors' Motion to Alter Judgment, the case was appealed to the District Court in Civil Case Number 96-3388 by Debtors and their attorney, Jianbin Wei.

While the Appeal in Civil Case Number 96-3388 was pending, the Debtors filed an "Amended Motion (1) to Rescind Orders Authorizing Certain Creditors to Guarantee the Payment of Trustee's Attorney's Fees; (2) to Remove Trustee and Trustee's Attorney under § 324(a); and (3) for Denial of All Compensation to Trustee's Attorney" on October 9, 1996. An extensive hearing on such motion was held on October 21, 1996. The Bankruptcy Court entered an Order denying such motion on November 26, 1996. The Debtors filed a Notice of Appeal from such Order on December 6, 1996, and that appeal was

assigned Civil Case Number 97-3044-CV-S-3. The Bankruptcy Court entered an Amended Order on March 17, 1997.

Civil Case No. 96-3388 and Civil Case No. 97-3044 were consolidated in the District Court by an Order entered on March 27, 1997, and subsequently heard and ruled by Judge Ortrie D. Smith. The District Court entered its Order and Judgment affirming the Bankruptcy Court decision on November 7, 1997. Additionally, the District Court indicated that sanctions would be imposed against Debtors and their attorney. The District Court then entered its Order affirming the Bankruptcy Court's ruling in Civil Case No. 97-3044 on November 17, 1997. Debtors filed an Amended Motion for Rehearing on November 26, 1997, which was denied by Order entered on December 2, 1997.

On January 2, 1998, Debtors and Wei filed their Notice of Appeal from the District Court decisions entered on November 7 and November 17, 1997. Thereafter, the District Court entered its Order awarding sanctions on January 27, 1998. On February 24, 1998, Debtors and Wei filed an Amended Notice of Appeal regarding the Court's Order of January 27, 1998. Once again, the Court of Appeals for the Eighth Circuit affirmed the orders of the District Court in an unpublished Opinion filed on July 27, 1999. *See* Appendix A attached to Petitioner's Brief. Debtors and Wei filed their Motion for Rehearing, which was denied on August 31, 1999. Wei then filed his Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. BECAUSE PETITIONER WAS PROVIDED NOTICE AND OPPORTUNITY TO BE HEARD BEFORE THE IMPOSITION OF SANCTIONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER WAS NOT DENIED HIS RIGHT OF DUE PROCESS WHEN THE COURTS BELOW ASSESSED SANCTIONS AGAINST HIM PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RULE 9011 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE.

In response to the filing of Debtors' Independent Action, the Trustee filed a Motion for Sanctions under Federal Rules of Bankruptcy Procedure Rule 9011. The basis for the Trustee's motion was that the Debtors' argument was based on a misinterpretation of the Bankruptcy Code and was neither supported by the language of the Code nor any case law or a good faith argument for the extension, modification or reversal of existing law.

In *Graven V*, the Eighth Circuit Court of Appeals warned that "[w]hile this appeal closely borders on the frivolous, we exercise our discretion by declining to impose sanctions." *Graven V*, 64 F.3d at 456. Within a short time after the Eighth Circuit issued that opinion, the Debtors filed the Independent Action, in which the Bankruptcy Court found that:

> [T]he Gravens have now crossed the border into frivolity. They have continued to abuse the bankruptcy system to perpetuate their fraud. Not only have they wasted this Court's time (and thereby taxpayer resources), they have wasted the time of the creditors, the trustee, and the trustee's attorney, and have caused the

> trustee to incur additional unnecessary expenses to defend this action.

Graven VI, 196 B.R. at 512. The Debtors' Independent Action was properly dismissed. Debtors were attempting to relitigate issues which had been decided against them numerous times and which had been repeatedly affirmed on appeal. Debtors argued for the application of Code sections which had no application to this action and any such argument should have been raised in *Graven II* and *Graven III*, well over seven years ago. Such Independent Action, as well as this current appeal, could only have as its purpose to harass, to cause unnecessary delay or needlessly increase the cost of litigation or administration of the case. The sanctions against the Debtors and their attorney, Jianbin Wei, were properly imposed under Bankruptcy Rule 9011.

Debtors and Wei also complain of the District Court's imposition of sanctions under Federal Rules of Civil Procedure Rule 11. "[A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L.Ed.2d 359, 110 S.Ct. 2447, 2461 (1990). Based upon the *Cooter & Gell* case, the United States Court of Appeals for the Seventh Circuit has explained that the Court of Appeals "must review a sanctions determination with considerable deference." *LaSalle National Bank of Chicago v. County of DuPage*, 10 F.3d 1333, 1337 (7th Cir. 1993). The District Court clearly did not abuse its discretion in imposing sanctions under Rule 11.

Debtors allege that the District Court did not adequately explain the basis for the sanctions. In the background section of the Order, the District Court explained:

> This case has been in the bankruptcy system for approximately ten years. The Debtors have filed and refiled motions and appeals with the Bankruptcy Court and with both this Court and the Eighth Circuit Court of Appeals. (Footnote omitted). Debtors [sic] current appeal is requesting relief from this Court from the denial by the Bankruptcy Court of a Motion to Alter Judgment of the Dismissal of Debtors' First Amended Complaint for Independent Action for Relief from Involuntary Chapter 7 Bankruptcy Proceedings, Judgments and Orders. This appeal contains a repeat of the same fundamental claim that was the basis of this case from the beginning. The Debtors have once again appealed the very same underlying issue that has been previously decided by both this Court and the Eighth Circuit Court of Appeals.

It is clear from the District Court's Order that it understood that Debtors were once again attempting to relitigate issues which have now formed the basis of three appeals to the Court of Appeals for the Eighth Circuit and two appeals to this Court. It is clear that Debtors are still seeking the dismissal of this bankruptcy case which was denied by the Bankruptcy Court in 1989. While the District Court did not go into great detail concerning the frivolous nature of Debtors' appeal, "even a perfunctory order may at times suffice if the award of sanctions was clearly appropriate from the face of the record." *Katz v. Household International, Inc.*, 36 F.3d 670, 673 (7th Cir. 1994). Based on the frivolous arguments raised by

Debtors, as well as the long history of this bankruptcy case, it is clear that the District Court did not abuse its discretion in imposing sanctions under Rule 11.

Debtors next argue that the District Court did not follow the proper procedure because the sanctions were imposed on the Court's own motion without the issuance of a show cause order and provided for payment of the sanctions to the Trustee. Based on the Advisory Committee Notes to Rule 11, the Debtors argue that court initiated sanctions can only be payable to the court. Rule 11, however, does not include any such restriction and therefore, under the plain language of the rule, the Court's award is not improper.

With respect to the District Court's failure to issue a show cause order, such an order was unnecessary in this particular case. The purpose of a show cause order is to allow the party threatened with sanctions a chance to be heard. In raising the due process argument, Wei mischaracterized the District Court's finding and completely ignored the fact that he was afforded the fundamental due process rights of notice and the opportunity to be heard. Subsection (c)(1) of Rule 11 provides for the filing of a separate motion for sanctions. The Trustee filed his "Motion for Sanctions" on November 20, 1996. *See* App. 1-App. 4. The motion was served on the Debtors' attorney, Jiabin Wei. *See* App. 4. Moreover, the motion clearly stated the basis for the motion for sanctions pursuant to subsections b(1) and (b)(2) of Rule 11. *See* App. 3.

Debtors and Wei clearly received notice of the Trustee's motion for sanctions, and the possibility that sanctions might be imposed against not only the Debtors,

but against Wei as well. On or about December 2, 1996, the Debtors and Wei filed extensive "Suggestions in Opposition to Motion to Dismiss Appeal and to Motion for Sanctions" detailing why they believed that sanctions were not appropriate. *See* App. 5-App. 17. In filing their joint brief, the Debtors and Wei clearly exercised their right to respond as provided by Rule 11. On November 7, 1997, the District Court affirmed the Bankruptcy Court's judgment which included an award of sanctions, and imposed sanctions upon both the Debtors and Wei.[2] Simply because the Debtors and Wei failed to persuade the Court does not mean that their due process rights were ignored. The sanctions against the Debtors and their attorney, Jianbin Wei, were properly imposed under Federal Rule of Civil Procedure 11.

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[2] The District Court's order of November 7, 1997 is entitled "Order Affirming United States Bankruptcy Court's Ruling, Imposing Sanctions Against the Debtor/Appellants and Overruling Appellee's Motion to Dismiss and for Sanctions." The language of the order can only be a typographical error. The Court clearly states in the November 7, 1997 order that sanctions are imposed against both the Debtors and their attorney, Wei. No motion for clarification of the November 7, 1997 order was filed by either party. Wei's argument that the District Court imposed sanctions *sua sponte* is not a reasonable interpretation, however, particularly in light of the fact that the Trustee filed a motion for sanctions, and the Court subsequently imposed sanctions in its "Order Awarding Sanctions" entered on January 27, 1998. In that order, the Court imposed sanctions in favor of the Trustee and against the Debtors and Wei jointly and severally, in the amount of $10,235.00, representing the reasonable attorneys' fees and expenses incurred by the Trustee in defending the consolidated appeal.

The Court of Appeals for the Eighth Circuit affirmed the District Court judgment, including the imposition of sanctions against both the Debtors and Wei. The Eighth Circuit found that the sanctions imposed by both the Bankruptcy and District Courts were justified, and that neither court abused its discretion in imposing sanctions against the Debtors and Wei. The sanctions against the Debtors and their attorney, Jianbin Wei, were properly imposed under Federal Rule of Civil Procedure 11 and under Federal Rule of Bankruptcy Procedure 9011.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari filed by Jianbin Wei should be denied.

Respectfully submitted,

THOMAS J. O'NEAL
of
SHUGHART THOMSON & KILROY, P.C.
901 St. Louis, Suite 1200
Springfield, MO 65806
(417) 869-3353
(417) 869-9943 (facsimile)

Counsel for Respondent

Dated: May 15, 2000

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

In Re:	Bankruptcy No. 87-04885-S-7-FWK
BOBBY NOAH GRAVEN and BOBBY F. GRAVEN, Personal Representative of the Estate of Millie Ann Graven, Deceased,	Adversary No. 95-6077-S-2
Debtors.	
BOBBY NOAH GRAVEN and BOBBY F. GRAVEN, Personal Representative of the Estate of Millie Ann Graven, Deceased, Debtors, and JIANBIN "JIM" WEI,	Civil No. 96-3388-CV-S-3
Appellants,	
-vs-	
RICHARD V. FINK, TRUSTEE,	
Appellee	

MOTION FOR SANCTIONS

(Filed Nov. 20, 1998)

COMES NOW Appellee, Richard V. Fink, Trustee, through his attorneys, and moves the Court for appropriate sanctions under Bankruptcy Rule 9011 against Appellants and their attorney, and states to the Court as follows:

1. Appellants, Bobby N. Graven and Bobby F. Graven as Personal Representative for the Estate of Millie Ann Graven, are the Debtors in the underlying bankruptcy case. Debtors are appealing from the dismissal of their First Amended Complaint for Independent Action for Relief from Involuntary Chapter 7 Liquidation Proceedings, Judgments, and Orders as well as the imposition of sanctions against Debtors and their attorney under Bankruptcy Rule 9011.

2. Debtors First Amended Complaint sought to have all the prior Orders and Judgments entered in the underlying bankruptcy case and the related adversaries since January 24, 1989, set aside. Such Orders and Judgments include rulings by the Bankruptcy Court, this Court as well as the United States Court of Appeals for the Eighth Circuit. The extensive history of this case is discussed in Appellee's Brief.

3. Debtors First Amended Complaint is clearly barred by the Doctrine of the Law of the Case. Further the Debtors have not presented any new facts but have only raised new legal arguments which are clearly frivolous and without merit. Further, regardless of the merits of such legal arguments, if such arguments were to be raised they should have been and could have been raised in the prior proceedings.

4. The Bankruptcy Court found that the First Amended Complaint was barred by the doctrine of the law of the case and based upon a clear misinterpretation of the Bankruptcy Code and therefore dismissed such action. Likewise, this appeal is based on the same clear

misinterpretation of the Bankruptcy Code and should likewise be dismissed.

5. While this appeal was timely filed as to the Court's Judgment in Adversary No. 95-06077, the Debtors are also seeking to set aside an Order and Judgment entered by Bankruptcy Court on February 22, 1996 in the underlying bankruptcy case. No timely Notice of Appeal was filed with respect to such Judgment and therefore such Judgment is not properly before this Court.

6. This appeal is clearly frivolous and is not based on or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. The only possible purpose for this appeal is to harass, to cause unnecessary delay or needlessly increase the cost of litigation.

WHEREFORE, Appellee, Richard V. Fink, Trustee, prays for the Court to enter appropriate sanctions under Bankruptcy Rule 9011 against appellants and their attorney, including Appellee's reasonable attorney's fees, for Appellee's costs herein expended, and for such further relief as the Court deems proper.

BUSSELL, O'NEAL & HALL, LLP

By: /s/ Richard Rollings, Jr.
Attorneys for Appellee

Richard L. Rollings, Jr.
Missouri Bar No. 40650
901 St. Louis St., Ste. 1200
Springfield, MO 65806
(417) 865-1200 Telephone
(417) 865-1244 Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on all counsel of record by U.S. Mail, first class postage prepaid, on November 20th, 1996:

Mr. Jianbin Wei
Attorney at Law
The Vandivort Administrative Center
302 E. Walnut Street, Ste. 111-C LL
Springfield, MO 65806

Mr. Joel Pelofsky
United States Trustee
818 Grand Blvd, Suite 200
Kansas City, MO 64106

/s/ Richard Rollings, Jr.
Richard L. Rollings, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

IN RE: BOBBY N. GRAVEN and BOBBY F. GRAVEN, as Personal Representative for the Estate of Millie Ann Graven Debtors	)	Bankruptcy Case No. 87-04885 Adv. No. 95-06077
BOBBY NOAH GRAVEN, BOBBY F. GRAVEN, as Personal Representative for the Estate of MILLIE ANN GRAVEN Deceased, Debtors, and JIANBIN "JIM" WEI Appellants vs. RICHARD V. FINK Appellee	)	Civil No. 96-3388-CV-S-3

SUGGESTIONS IN OPPOSITION TO MOTION TO DISMISS APPEAL AND TO MOTION FOR SANCTIONS

COME NOW Appellants and for their opposition Appellee's Motion To Dismiss Appeal and Motion For Sanctions state to the court as follows:

On November 20, 1996, Appellee filed Motion To Dismiss Appeal and Motion For Sanctions. The two motions are identical except the latter motion contained

paragraph 6 wherein Appellee alleges that this appeal is "clearly frivolous and is not based on or warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law," and that the "only possible purpose for this appeal is to harass, to cause unnecessary delay or needless increase in the cost of litigation."

I. MOTION TO DISMISS APPEAL

Appellants would like to address the motion to dismiss first. Appellee seeks dismissal of this appeal based on the law of the case doctrine. In their Amended Brief already filed with the Court, Appellants have discussed the inapplicability of the Doctrine to this independent action and therefore to this appeal. Appellants have also pointed out that the doctrine is a judicially-created or common law rule and that its rigid application does violence to the black-letter law as set out in Rule 60 of the Fed. R. Civ. P., and would emasculate and make Rule 60(b) meaningless. In their Reply Brief, Appellants have also provided additional responses to Appellee's attempt to have this Court apply the doctrine and dismiss this appeal.

Appellee argues that regardless of the merits of Appellants' legal arguments, such arguments should and could have been raised in prior proceedings. In so arguing, Appellee misses altogether the central point of Debtors' independent action: Debtors seek relief from this involuntary bankruptcy case not only on the ground that the original involuntary conversion was in violation of §§303(a) and 1208(e) of the Bankruptcy Code but also on

the ground that regardless of whether the original conversion was proper, the *current* Chapter 7 proceedings are being maintained in violation of said statutes. In this independent action, Debtors seek the dismissal of the *current* involuntary bankruptcy case and ask that they be relieved from the *current* involuntary Chapter 7 bankruptcy proceedings. In that sense, Debtors' independent action raises more of a question concerning the legality of the *current* involuntary bankruptcy proceedings than of the propriety of the original conversion. For that reason, it does not matter whether or not Debtors raised or could have raised the arguments they are making now. Debtors are entitled to a decision on the legality of the current involuntary Chapter 7 bankruptcy proceedings against a family farmer. For the same reason, Debtors are not relitigating an issue already decided but a brand new issue of whether the continued prosecution of the *current* Chapter 7 proceeding is prohibited by §§303(a) and 1208(e) and the Bankruptcy Code's general policy prohibiting involuntary chapter 7 case against family farmers of this country. Please note that Rule 60 of the Federal Rules of Civil Procedure allows relief not only from "judgments" but also from "proceedings."

Appellee states in *In re Mandalay Shores*, 62 B.R. 758 (Bank. N.D. Fla. 1986), the case on which Debtors rely, "the ability to convert that case to Chapter 7 was not an issue . . . since the case had already been dismissed nearly seven months prior to" the opinion, and "[t]he issue in that case was the amount of compensation." (Page 2-3 of Appellee's Suggestions In Support of Motion To Dismiss and Motion For Sanctions). Appellee, however, does not mention that in the opinion the court stated that *because*

the debtor, a charitable organization, "was not eligible to be an involuntary debtor under Chapter 7 by virtue of §303(a) of the Bankruptcy Code, and because it [the debtor] was unwilling to convert, this Court had no choice but to enter an order of dismissal. . . . " In other words, the quoted statements was the basis of the *Mandalay Shore* court's decision to dismiss rather than to convert the case.

Appellee also cites *In re Graven*, 64 F.3d 453, 456 (8th Cir. 1995), stating that the Eighth Circuit warned that Debtors' arguments "borders on the frivolous," but "Debtors have failed to heed the warning." Appellee fails to tell this Court that Debtors were not parties to that appeal. More importantly, when the Eighth Circuit issued its opinion in September of 1995, the court was not presented with the arguments Debtors are making now in this independent action. It is clear that Appellee is trying to intentionally mislead this Court and is attempting to use the Eighth Circuit's decision to blackmail this Court from giving any serious consideration to Debtors' legal position.

This Court should also note that Appellee's Motion To Dismiss says nothing about the Second Count of Debtors' Independent action and why that count was so without merit and appeal from its dismissal should be dismissed automatically by this Court. Appellee's failure in this respect is fatal and his motion to dismiss should be overruled.

For the reasons stated above and for the additional reasons stated in Appellants' Amended Brief and Reply

Brief, which are incorporated herein by reference, Appellants respectfully submit that Appellee's Motion To Dismiss Appeal should be denied.

II. MOTION FOR SANCTIONS

As stated in Appellee's Suggestions in Support of his two motions, this is not the first, second or even third time that Appellee or his attorney has sought or threatened sanctions against his opponents including his opposing attorneys in the course of these bankruptcy proceedings. It has been the practice of the Trustee and his attorney throughout these bankruptcy proceedings to use threats of sanctions and criminal prosecution to intimidate anyone who dared to come in their way and who dared to raise a legal argument regardless of whether such argument was supported by specific statutory or case law. It is very regrettable and unfortunate that such practice has been successful thus far with the aid from the bankruptcy judge.

In making repeated motions for sanctions against their opponents, Appellee and his attorney have presented themselves as the Saints, the clean, and the righteousness, and their opponents as the Devil, the dirty, and the evil. They have failed, however, to tell this Court that the trustee' attorney has *knowingly* committed actual conflicts of interest in this bankruptcy case by representing the bankruptcy estate on the one hand and at the same time representing an interest adverse to the interest of the bankruptcy estate. Such dual representation was done even after the trustee's attorney was specifically warned of the actual conflict of interest. Even after Debtors filed

motions to bring the actual conflict of interest out in the open, the trustee and his attorney attempted to hide and refused to make voluntary disclosure of the same. See attached *Trustee's Motion For Protective Order* and *Debtors' Suggestions in Opposition to Trustee's motion for Protective Order* which have been filed and are pending in the bankruptcy court. Neither have they told this Court that Trustee's attorney has been taking money from certain creditors of Debtors including secured creditors for the past eight years without statutory authority and without court authorization. Nor have Appellee and his attorney informed this Court that Trustee and his attorney have *intentionally* made numerous misrepresentations to the courts in an effort to keep this bankruptcy case going so that the attorney could keep on earning fees. What was even more outrageous is that Trustee's attorney would charge the bankruptcy estate for drafting and forwarding for filing Application for Employment of itself on behalf of the Trustee. It would also charge the bankruptcy estate for telephone conference with the Trustee advising it of the court's approval of the application and then charge the bankruptcy estate again for receiving and reviewing "file stamped copies of Trustee's Application to Employ Attorney" and file stamped copies of the court order approving the application both of which were drafted by the Trustee's attorney itself. (See Highlighted portion on page 2 of attached Billing Records of the Trustee's attorney, the law firm of Bussell, Hough, O'Neal, Crouch & Hall, dated August 23, 1989. This billing record was submitted to the bankruptcy court as an Exhibit at a hearing on October 21, 1996 on Debtors' Motion To Remove the Trustee and his attorney). A trustee's attorney can not

charge the estate for work that belongs or ought to have been performed by the trustee himself. *In re WHET, Inc.*, 62 B.R. 770, 778 (Bankr. D. Mass. 1986). The trustee's attorney would also charge the bankruptcy estate for work done for those creditors who were paying it during these bankruptcy proceedings. (See again highlighted portions attached Billing Records of the Trustee's attorney, the law firm of Bussell, Hough, O'Neal, Crouch & Hall, dated August 23, 1989).

Appellants are not making baseless allegations against Appellee and his attorney here, nor can Appellants list here all the misconducts and conflict of interest committed by the Trustee and his attorney. Appellants would like, however, to inform this Court that Debtors have initiated proceedings to reveal the above-mentioned misconducts and to remove Appellee and his attorney. Debtors' motion to remove the trustee and his attorney and related motions were heard at a hearing on October 21, 1996, where Debtors presented overwhelming evidence of the trustee's and his attorney's actual conflict of interest and other misconducts throughout this bankruptcy case. See attached *Debtors' Motion To Rescind Orders Authorizing Certain Creditors To Guarantee the Payment of Trustee's Attorney's Fees; (2) To Remove the Trustee and His Attorney; and (3) For Denial of All Compensation To Trustee's Attorney*, the affidavits of Mr. Scott Stinson and Debtor Bobby N. Graven, the affidavit of Mr. Bob W. Crouch, and copies of certain Exhibits and court documents. All of the attached affidavits and Exhibits were submitted to the bankruptcy court at the hearing on October 21, 1996. It was very regrettable and unfortunate that the bankruptcy judge again sided with the trustee

and his attorney, orally dismissing the actual conflict of interest and misconducts as nothing warranting any type of sanction against the Trustee and his attorney. Judge Koger stated at the October 21, 1996, hearing that a written opinion would follow so that Debtors could have this appeal and his rulings on the removal and related matters considered together. But to this date, the bankruptcy judge has yet to issue a written opinion. *Appellants respectfully ask this Court to delay the consideration of this appeal and Appellee's motions to dismiss appeal and for sanctions so that this appeal can be consolidated with Debtors' appeal from the bankruptcy court's judgment denying Debtors' motion to remove and related motions.* In a consolidated appeal, this Court would be able to see better why we are here today, why Debtors have been fighting so hard for so long, and that the ones who should have been sanctioned are not Debtors and their counsel but the trustee and his attorney. Appellants must suggest that the misconducts and actual conflict of interest of the Trustee and his attorney, particularly the fact that these bankruptcy proceedings have been financed by certain creditors without statutory authority and without court authorization, have so tainted every aspect of this bankruptcy case and have made such a mockery of the bankruptcy system of our country that this bankruptcy case should be dismissed immediately. Those who have committed so many wrongs of such serious nature must be held accountable. Not until that is done can the integrity of the bankruptcy system be restored. A decision by this Court to dismiss this bankruptcy case because of Trustee's and his attorney's misconducts and actual conflict of interest would

render it unnecssary [sic] for this Court to consider this appeal.

Debtors' current attorney was admitted to the Missouri Bar only two years ago and to the Bar of the Western District in the latter part of 1995. He, as every licensed attorney, undertook the oath to "practice law to the best of [his] knowledge and ability and *with consideration for the defenseless and oppressed*." He would not have undertaken to represent Debtors and would not have continued such representation unless he firmly believed that the legal positions he advanced on Debtors' behalf were well grounded in the facts and were based at least on a good faith argument for the reversal of the existing law and unless he was convinced that terrible injustice had been done to Debtors in these bankruptcy proceedings through misrepresentations and misconducts on the part of the Trustee and his attorney. The court documents filed in the course of this independent action including the few ones mentioned by Appellee in his motions to dismiss appeal and for sanctions were all well supported by case law and by reason and logic. Appellants' Amended Brief is too supported by specific case law and by arguments which are not merely based on the technicalities of the law but also on sound social and economic policies. Under these circumstances, the imposition of judicial sanctions is clearly unwarranted. The bankruptcy judge's imposition of sanctions was clearly an abuse of judicial power and a retaliation for Debtors' exercising their constitutional right to petition the government to redress a wrong they so firmly believe has been done to them.

Appellee repeatedly stresses the fact that the courts in the earlier proceedings of this case have ruled against Debtors. The fact that the courts have decided a narrower issue – which of the two statutory provisions, §1208(b) or §1208(d), should prevail – in a certain way, however, is not an absolute bar to the consideration of a bigger and broader issue of whether a bankruptcy court can conduct an involuntary Chapter 7 bankruptcy case against a family farmer of this country without violating federal statutory law and Congressional policy. Nor should it be the basis for sanctions where Debtors' legal position presents a plausible legal theory that carries logical appeal. Indeed, the rule on sanctions expressly allows a party to make good faith arguments for the reversal of the existing law. The propriety of the sanctions should not be decided on the basis that the courts in earlier proceedings have ruled against Debtors but on whether the legal position Debtors now take is grounded in the record and is supported by a good faith argument for the modification or reversal of the existing law. See *Smith v. National Health Care Services of Peoria*, 934 F.2d 95 (7th Cir. 1991).

Appellee also quotes the bankruptcy judge in saying that "This case, which was contrived as an attempt to defraud creditors, has been in the bankruptcy system since 1987, and the filing of this complaint is clearly an attempt to further prolong the fraud committed against the Gravens' creditors." Appellee again does not want this Court to review the sanctions on the merits. Instead, he attempts to have this court rubber-stamp the quote, dismiss this appeal and impose sanctions on his opponents. As the appeal record shows clearly, there is no factual basis for the bankruptcy judge's finding that "the

filing of this complaint [for independent action] is clearly an attempt to prolong the fraud committed against the Gravens' creditors." Furthermore, by reason of the apparent contradiction on the fraudulent intent issue, Judge Koger's finding that this inedependent [sic] action is "clearly an attempt to further prolong the fraud committed against the Gravens' creditors" deserves no respect or credibility.

As Justice Stephen Breyer said not too long ago at his swearing ceremony to be an Associate Justice on the Supreme Court of the United States, the judicial branch and the Supreme Court occupy such an important place in the life of the people of this country that when an aggrieved citizen feels that every door has been closed to him, he still can come in the door of the court where his complaint can be heard. But once in the court litigants are at the mercy of the presiding judge. They can only look up to the judge and his "honor" to follow the law and to be fair and impartial in his factual findings. Appellants truly feel that the door of the bankruptcy court and the mind of the bankruptcy judge were tightly shut to them. To impose sanctions on anyone who dares to come in the court to make a complaint of the court's administration of justice regardless of what the complaint is and whether it has any merits, as was done by the bankruptcy judge in the instant case, makes the judicial power beyond recognition of the people and the law. Appellants therefore ask that the door of this Court be truly open to them and that the Court give a fair and objective review of their legal positions and arguments on the merits.

It has been held that on appeal from Rule 11 sanctions, an appellate court should not impose further sanctions where the amount of sanction imposed was substantial and where the appeal was not frivolous. *Hedges v. Resolution Trust Corp.*, 32 F.3d 1360, 1364 (9th Cir. 1994). In the instant case, putting aside the two counts of their complaint which are well supported by specific statutory and case law and by the records or at least by a good faith argument for the reversal of the existing law, Appellants respectfully submit that their appeal from the imposition of Rule 9011 sanctions is clearly warranted.

In imposing Rule 9011 sanctions, Judge Koger allowed Trustee's attorney fees and cost incurred in defending against Debtors' Motion For Sanctions for Trustee's attorney having *ex parte* communications with the bankruptcy judge concerning pending case. That was clearly an abuse of discretion for the reasons stated in Appellants' Amended Brief, pages 42-43. The same can be said with respect to the bankruptcy judge's allowing fees to Trustee's attorney for items of service that had nothing to do with Debtors' independent action. See Appellants' Amended Brief, pages 42-43. Appellants are warranted in taking this appeal at the very least with respect to the allowing of these fees and costs.

For the foregoing reasons and for the additional reasons stated in Appellants' Amended Brief and Reply Brief, which are incorporated herein by reference,

Appellants respectfully ask that this Court deny Appellee's Motion For Sanctions.

BOBBY N. GRAVEN and
BOBBY F. GRAVEN, as personal representative for the estate of
MILLIE ANN GRAVEN, deceased,
JIANBIN "JIM" WEI,
Appellants,

By: Jianbin "Jim" Wei
Jianbin "Jim" Wei
MO. Bar. No. 45593
305 E. Walnut St.,
Suite LL 111-C
Springfield, MO 65806
(417) 831-0393

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing is ✔ hand-delivered to or ___ mailed, by depositing a copy of the same in the mail box of the United States Post Office with sufficient first class postage paid, to the following on this 2nd day of Dec., 1996.

Thomas J. O'Neal
Bussell, O'Neal & Hall LLP
Attorney for Appellee
901 St. Louis Street, Ste. 1200
Springfield, MO 65806

/s/ Jianbin "Jim" Wei
Jianbin "Jim" Wei